DELAWARE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING PANEL

In the Matter of	)	
	)	
(" Student")	)	ORDER
Petitioner,	)	Hearing Date: May 10, 2010
v	)	Date of Order: May 25, 2010
RED CLAY SCHOOL DISTRICT	)	DE DP 10-11 and DE DP 10-14
School District ("District")	)	

Parent **** ***** Road, ****, DE 19***
Counsel for District: James J. Sullivan, Esq. , Buchanan, Ingersoll & Rooney
Brandywine Building, Suite 1410, 1000 West Street, Wilm., DE 19801

Final Order and Opinion

I. INTRODUCTION

Student presently attends the "Elementary" School. Parent lives in the Red Clay Consolidated School District ("District"). Student has been identified as having a subgroup of autism, Asparger's syndrome. N.T hearing 5/10/10, D.G. at p. 65, l. 13 –l.16.

Parent brought two separate Due Process Complaints. The first was under DE DP 10-11. Parent filed the original complaint for DE DP-11 on March 30, 2010. Regarding the Original Complaint filed on March 30, 2010 in DE DP 10-11, District on April 6, 2010 filed a Motion to Dismiss the Original Complaint, without prejudice to Parent's right to file an amended complaint. On April 7, 2010, Parent filed an amended Complaint on DE DP 10-11. On April 9, 2010, District answered the Original Complaint. N.T prehearing 4/16/10 at p. 8, l. 15-17.[1]

Additionally, on April 7, 2010, Parent brought a second Due Process Complaint under DE DP 10-14. At a teleconference prior to the Prehearing, neither party objected to a Prehearing Conference encompassing both Complaints on April 16, 2010.

[1] District indicated an intent to respond to the second Amended Complaint, N.T prehearing 4/16/10 at p. 8, l. 23-24. However, none is in the record. Similarly, District was given the opportunity to challenge the sufficiency of the 4/7/10 amended complaint in DE DP10-11 and the complaint in 10 DE DP 10-14.

As there were similarities in the language of the April 7, 2010 Amended Complaint under DE DP 10-11 and the April 7, 2010 Complaint under DE DP-10-14, on April 9, 2010 the Panel Chair requested each party's position concerning the consolidation of these matters. Parent objected to consolidation. District moved to consolidate DE DP 10-11 and 10-14 (as well as requesting the joinder of the State – District later withdrew its Motion to Join State). After giving both parties opportunity to express in writing their arguments as to consolidation as well as orally, this matter was consolidated on April 16, 2010 N.T pre hearing 4/16/10 at p. 2, l. 17-23. The reason for consolidation was to decrease the possibility of any lack of information imposing a negative, substantive educational effect on Student. Another reason was to lessen the amount of litigation expense.

A Prehearing conference was conducted on April 16, 2010. At that pre hearing both parties were informed that the matters before the Panel were merely those as set forth in the: (1) April 7, 2010, amended Complaint under DE DP 10-11[2] April 16, 2010 N.T pre hearing 4/16/10 at p. 7, l. 16 – p.8, l.10; and (2)the April 7, 2010 second Complaint under DE DP 10-14, p.9, l.12. This was confirmed in the written pre hearing Order of April 26, 2010. Also at the April 16, 2010, each party was informed of the place and time of hearing (4/16/10 at p. 34, l. 19) for May 10, 2010.

II. FINDINGS OF FACT.

A. At the outset of the hearing, Parents documents P-1 through P-16 were admitted without prejudice to District's objection. May 10, 2010 N.T hearing 5/10/10 at p. 3, l. 23 –p. 6, l.3. It is now found that there is no prejudice to District by the admission of P-1 through P-16. District had P1- P16 via email as of May 4, 2010.

[2] And not the original Complaint under DE DP 10-11.

In a prior letter, there was an ambiguity as to 5 regular days versus 5 business days. Most importantly, the substance of the dispute is more important than a technical violation[3] that does not diminish a party's ability to prepare. Accordingly, these documents were admitted.

B. The District did not fail to call an IEP meeting "after specific written request to address the concerns of the parent." #1 April 7, 2010 Amended Complaint DE DP 10-11.

C. The District did not violate "Federal IDEA regulations with respect to IDEA Part 300/F/300.613" (April 7, 2010 Complaint DE DP 10-14) and granted parent sufficient access on a reasonably, timely basis to Student's educational documents/records dates such as to allow Parent adequate time to reasonable prepare for any meetings concerning Student's IEP.

1. District allowed Parent sufficient, reasonable opportunity to review and copy the "full IEP file" that Parent made in the March 29, 2010 IEP meeting. (p.2 Fact #1 April 7, 2010 Complaint DE DP 10-14). It specifically was not a violation that District initially offered Parent April 14, 2010 at 2:00 p.m. , April 20, 2010 at 2:00 p.m. and April 26, at 12:00 as times to copy documents. It was noted that a school break occurred where employees of the District were off after Parent requested documents. Further, there was a reasonable attempt to accommodate Parent. There was insufficient evidence that District knew of Parent's unavailability on April 14, 2010. Indeed, at the prehearing conference of April 16, 2010, Parent indicated that he had all the documents that he needed to proceed with the Due Process hearing, N.T Pre hearing 4/16/10 at p. 18, l. 15. Moreover, Parent did not want another resolution meeting after the documents were provided

[3] 5 days instead of 5 business days,

on April 15, 2010. Parent indicated at the April 16, 2010, the parties had agreed no resolution was possible. Pre hearing 4/16/10 at p. 25, l. 10.

D. The District reasonably addressed the relevant items raised on Parent and Parent's IEP meeting agenda. #2 April 7, 2010 Amended Complaint DE DP 10-11. It was not a violation for the District to refuse to consider LRE prior to full assessment of Student's educational needs.

E. The District did not fail appropriately include Parent/ Parents in the IEP Process and there is no violation from Parent's alleged failure to consider him a partner. By way of non exclusive example,

1. Parent's choice that language in Prior written notice be altered N.T hearing 5/10/10, D.G. at p. 29, l. 24 and an edit clarifying the need for a pull out in the IEP was added at Parent 's request, N.T hearing 5/10/10, D.G. at p. 35, l. 10.

2 . Student's functional statement was added at Parent's request. N.T hearing 5/10/10, D.G. at p. 34, l. 23-24.

F. In reaching this decision, the Panel considered each and every allegation and request for relief as set forth by Parent in the Amended Complaint in DE DP 10-11 and Parent's Complaint of DE DP 10-14.

III. SUMMARY OF DECISION

There is insufficient evidence that District has violated FAPE in either Complaint. District did allow Parent suitable input toward the development of the Student's IEP as set forth in Parent two April 7, 2010 complaints and did not deny Parent access to Student's records in a manner that compromised Parent's ability to actively participate in development of Student's IEP.

IV. DECISION

The District established its compliance with the IDEA insofar as the Complaints in this matter are concerned in developing Student's IEP and addressing Student's educational needs in the Least Restrictive Environment ("LRE"). District reasonably has included Parent and allowed Parent access to documents to develop Student's IEP.

The dispute between District and Parent seems to be that Parent wrongfully equates LRE with the different environments of particular schools. They are not the same.

On this distinction in T.Y., K.Y. on behalf of T.Y. v. New York City Department of Education, 584 F.3d 412(2d Cir. 2009), J. Barrington D. Parker stated that the requirement "that an IEP specify 'location' does not mean that the IEP specify a specific school site". " 'Educational placement' refers to the general educational program-such as the classes, individualized attention and additional services a child will receive-rather than the "bricks and mortar" of the specific school." Supra.

Parent contends that District failed to address LRE needs in context of Student's needs stemming from his Autism/Asparger's Syndrome in the context of Student's special sensory issues, executive functioning issues and social skills. N.T hearing 5/10/10, D.W. at p. 75-81. However, the District contended that first it had to determine Student's needs and what services to provide Student in an IEP and then there would be a determination of LRE. N.T hearing 5/10/10, D.G. at p. 44, l. 16 –23. The Panel found District witness D.G, credible when she testified that Parent disagreed as to the order of discussion of Student's needs first and then LRE premised upon the Student's needs. N.T hearing 5/10/10, D.G. at p. 45, l. 8. Moreover, D.G. testified that environment was being considered on each page in the IEP. N.T hearing 5/10/10, D.G. at p. 60, l. 23 – p. 61 , p.6.

However, on this issue, what is critical is **what is not present from Parent**. How does Parent's preferred difference in order of presentation by District in the development of Student's IEP present any possible difference for the Student. Parent has not presented evidence that one school in District can meet Student's educational needs, while another cannot. Isn't it just as likely that Student's needs can be met in more than one particular school?

In J.S. v. Lenape, 102 F. Supp. 2d 540 (D. New Jersey 2000), the District Court denied attorneys fees on the basis that a change from one school in the district to another" was not a change in educational placement" as Parent had not shown how the change would affect the Child's learning experience. Similarly, here Parent has not met this burden. Parent has not met the burden of showing a possible difference.

On the contrary, the record indicates the District encouraged parent to visit the various schools in the District. N.T hearing 5/10/10, D.G. at p. 67, l. 16-19.

While Parent expressed some preference, Parent testified that parent/he "has expressed concerns that the feeder school has certain challenges for this child that **may or may not** be able to be met." N.T hearing 5/10/10, D.W. at p.82, l. 6-7, Parent did not contend that the feeder school **would not be able** to meet the Student's needs. If the feeder pattern school can provide Student FAPE, as well as for example another school which Parent may prefer, and Parent had an opportunity to choice, but no slots were available at the preferred school, how is Student being denied FAPE by the failure to discuss the non available school in the development of the IEP. It follows then there is no procedural violation for what Parent claims happened, the refusal of the District to explore a "dead

end road" when an alternative road where FAPE could be provided was available.[4] The non availability of a slot is not only to the Student in this case, but similarly any Delaware student. Student is placed in the precise same situation as other children, not better or worse. Student's placement is neither more restrictive, nor less than the typical student.

Moreover, Parent's argument as to how and when LRE must be considered in an IEP presents a logical flaw. How could the District even discuss a particular "school" prior to determining Student's educational needs?

This presents a case where District is listening to Parent and no evidence has shown District did not allow Parent participation in the development of the IEP as alleged in the two complaints before this Panel. District is merely not obeying Parent when District believes he is wrong. In so doing District in not violating the IDEA 2004 and moreover, Parent misconstrues the effect of the "equal partners" language in the preamble to the IDEA 2004. Equal partners in an educational decisional making process differs from a Parent's right to veto. No evidence has been set forth that shows Parent was not permitted meaningful and full participation in the Student's IEP. As a result of the Due Process remedy, Parent has had an avenue to fully develop his arguments concerning procedural violations.

Parent's participation in the IEP process is evidenced by District's reaction to Parent's reasonable requests such as when he wanted included in the IEP the functional statement of Student, these were included. D.G. at p. 65 ,l.17- p. 66, l.21 and used by the IEP team.

[4] On the other hand, if the Choice school was the only school in the District that could provide FAPE for Student, the District's obligation would remain to provide FAPE at the choice school. However, that was not the complaint filed by Parent.

Moreover, while procedural violations were not found, even if they were 14 DE Admin. Code 926.13.2[5]states 3 limited circumstances where a Panel may find a denial of FAPE from a procedural violation, none of which exist in this case. There has been no showing that the lapse between Parent's request for documents March 29, 2010 and the date of provision, April 15, 2010 either impeded Student's right to FAPE or deprived Student of an educational benefit. Rather Parent contends that his attendance at a resolution meeting was somehow compromised. However, at the Prehearing the Panel Chair asked Parent whether he wished to go to another resolution session once he had the records on April 15, 2010. Parent did not request another resolution session, but rather stated that the parties were at an impasse insinuating a lack of value of another resolution session. Hence, it cannot be said that any provision of the documents after the resolution meeting **significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to Student.** 14 DE Admin. Code 926.13.2.2. More critically**, it is not found** that there was any obstructionist purpose in the District's pick of the dates to provide Student's Educational Records. Nor was there any evidence as to an effort Parent to give specific alternative dates as a method of resolution.

This brings us to the District's contention that Parent's Complaints are frivolous. However, even considering questionably inadmissable[6] testimony that District would incur legal fees if it did not accede to Parent's request, the Panel simply cannot find that **District has proven it more likely than not that** Parent had an inappropriate, obstructionist motive. It is just as likely that Parent is simply wrong as it is that Parent's purpose was to force District in the choice of unnecessary litigation or acceding to an

[5] See also, 20 U.S.C. Secs. 1415(f)(3)(E) and (f)m 1415(h)(4) and 1415(o)l
[6] settlement offers are typically excluded so as to allow parties to freely discuss settlement.

unwarranted request. **In deciding this, Parent should be aware that in not finding this frivolous, the Panel is simply saying it is just as likely Parent was innocently wrong and misguided by for example, the reading of isolated words in a Preamble taking the same out of context. This was a rather close, but unananimous, aspect of this decision.**

Lastly, both parties are advised that this decision concerns the rather limited issues posed by the April 7, 2010 amended Complaint of DE DP 10-11 and the April 7, 2010 Complaint in DE DP 10-14 as to development of an IEP. As the current IEP was not finalized until April 19, 2010, the contents of Student's April 19, 2010 IEP were not before this Panel (N.T hearing 5/10/10, D.G. at p. 69) and no decision is made as to their content.

Under 14 DE Admin. Code 926.16.0[7], " Any party aggrieved by the findings and decision made under 7.0 through 13.0 or 30.0 through 34.0 has the right to bring a civil action…" in the Family Court or the United States District Court, but must do so within ninety (90) days of the Date of this Decision.

Respectfully,

/s/ Gary Spritz	/s/ Kenneth Rose	/s/Patricia Toland
GARY SPRITZ	Kenneth Rose	Patricia Toland

Date Decided and Emailed and Mailed: May 25, 2010.

[7] 20 U.S.C. Secs. 1415(i)(2) and (3)(A) and 1415(l).